

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7044

Petition of City of Burlington, d/b/a Burlington)
Telecom, for a certificate of public good to)
operate a cable television system in the City of)
Burlington, Vermont (In Re: Amended Petition)
to amend Condition No. 17 of CPG related to)
completion of system build-out and to grant)
temporary relief from limitation in Condition)
No. 60 of CPG on financing operations))

Order entered: 11/23/2011

**HEARING OFFICER'S REPORT ON BURLINGTON TELECOM'S MOTION
FOR DECLARATORY RULING REGARDING CERTAIN PAYMENTS**

I. INTRODUCTION

The City of Burlington, d/b/a Burlington Telecom ("Burlington Telecom" or the "City"), seeks a ruling from the Public Service Board ("Board") that certain payments the City made to its consultants did not violate Condition 60 of Burlington Telecom's Certificate of Public Good ("CPG").¹ In this proposal for decision, I conclude that such payments did not violate the CPG.

II. PROCEDURAL HISTORY

On April 13, 2011, Burlington Telecom filed a motion for a declaratory ruling in this docket as to the inapplicability of Condition 60 of its CPG to certain payments it has already

1. Docket 7044, Certificate of Public Good (9/13/05) at 14. Condition 60 of the CPG states:

The City shall make payments on behalf of Phase III only when and to the extent that Phase III has cash reserves, revenues receivable, or other payments receivable that, collectively, equal or exceed the sum of the payments to be made by the City plus the balance of any other current payments owed to the City. BT may participate in the City's pooled cash management system provided, however, that BT shall reimburse the City within two months of the City's expenditure for any expenses incurred or payments made by the City in support of services that BT provides to non-City entities. The City shall obtain Board approval prior to appropriating any funds other than as described above in the support of BT's Phase III activities.

made from the City's general fund. In the alternative, Burlington Telecom sought the approval of the Board under Condition 60 for such payments. The Vermont Department of Public Service ("Department") and Comcast of Connecticut/ Georgia/ Massachusetts/New Hampshire/New York/North Carolina/Virginia/Vermont, LLC, d/b/a Comcast ("Comcast"), each filed responses to this motion on May 5, 2011. In addition to expressing other concerns, both the Department and Comcast were of the view that Burlington Telecom had provided insufficient documentation to support a ruling on its motion.

In response to a request by the Department for the City to provide additional information about the motion, Burlington Telecom filed a letter with the Board on May 27, 2011. Under a procedural Order issued on June 17, 2011, the parties were to provide any responses to Burlington Telecom's May 27 filing by June 24, 2011, and to work together to develop a schedule for adjudicating the motion.

The Department filed a letter on June 24, 2011, in which it indicated that it needed to have a fuller understanding of the City's financial situation before taking a position on the motion. The Department also indicated that there was general agreement among the parties that the motion presented a legal issue that could be decided on the basis of the parties' filings. At the Department's request and with the agreement of the other parties, the deadline for responses to the motion was extended to July 15, 2011, by which time it was believed the City would have provided additional requested information to the Department. After some delays and further information requests by the Department, the City advised the Board that all requested information would be provided to the Department by August 12, 2011.² Comcast and the Department filed their final responses to the motion on August 30 and August 31, 2011, respectively, and Burlington Telecom filed its reply on September 12, 2011.

III. FACTUAL BACKGROUND RELATED TO THE MOTION

Given the apparent agreement of the parties that the motion involves a legal issue and not any disputed factual issues, the relevant facts as set forth in Burlington Telecom's filings will be presumed to be accurate for purposes of adjudicating its motion for a declaratory ruling. The

2. See Department's filing of 7/25/11 and Burlington Telecom's filing of 8/12/11.

motion involves payments made from the City's general fund related to Burlington Telecom that the City has not charged to Burlington Telecom.

Based on the filings made by Burlington Telecom on April 13 and May 27, 2011, the payments at issue are for consultant and legal services related to (i) reports to a Blue Ribbon Committee created by the City Council, (ii) negotiations with potential investors in Burlington Telecom and with CitiCapital, Municipal Finance ("CitiCapital"), and (iii) criminal investigations and insurance coverage issues. From July 1, 2009, to May 18, 2011, the City made payments of \$354,799 for consultant and legal services related to Burlington Telecom issues, which the City has not charged to Burlington Telecom.³ This amount includes, among other items, \$275,000 that was paid to the City's financial consultants, Dorman & Fawcett ("D&F"),⁴ \$37,475 that was paid to other consultants for a report to the Blue Ribbon Committee and a business plan analysis, and \$17,778 which was paid to a law firm for criminal defense work. The financial consultancy services provided by D&F relate primarily to advice and assistance in connection with negotiations (i) with potential investors and/or partners in Burlington Telecom and (ii) with CitiCapital related to restructuring the Lease/Purchase Agreement dated August 9, 2007. The City anticipates that it will continue to incur expenses for the foreseeable future for services rendered by its financial consultants, D&F, in connection with ongoing negotiations.⁵

In its motion, Burlington Telecom indicates that the hiring of D&F was authorized by a City Council resolution in February 2010. This action followed the recommendation of a Blue Ribbon Committee on Burlington Telecom that was formed by the Burlington City Council in December 2009. The Blue Ribbon Committee advised the City "to retain an expert financial advisor to consider short and long-term strategies" towards the restructuring of Burlington

3. It should be noted that during the period from July 1, 2009, to May 18, 2011, Burlington Telecom was charged \$619,646 for legal, consulting, and regulatory expenses related to operational oversight, the proceedings in this docket, marketing and administrative assistance, and other matters. Burlington Telecom's filing of 5/27/11, at 6.

4. D&F also performed operational oversight services for which Burlington Telecom incurred expenses of \$219,705.

5. It is unclear what effect the recent complaint against the City filed by Citibank, N.A., as assignee of CitiCapital, in the United States District Court for Vermont, may have on the incurrence of expenses related to these consultant services or how the City intends to treat legal expenses related to this complaint. *See* letter dated September 2, 2011, along with a copy of the complaint, filed by Burlington Telecom in this docket pursuant to Condition 5 of its CPG.

Telecom's debt, obtaining private investment capital, creating a new entity, and changing staff and operating models.

IV. POSITIONS OF PARTIES ON THE MOTION

Burlington Telecom contends that the expenses at issue do not fall under Condition 60 (that is, expenses incurred "in support of services that BT provides to non-City entities"), but are legitimate City expenses. The City argues that Condition 60 does not govern all expenses incurred by the City that are related to Burlington Telecom, but are not exclusive to it, as the City needs expert financial advice to help minimize the City's large potential loss stemming from the operations and financing of Burlington Telecom. Burlington Telecom contends that while Condition 60 precludes the un-reimbursed use of City funds for Burlington Telecom's operations and services, it does not restrict the City from expending funds to protect the interests of taxpayers. Burlington Telecom acknowledges that its prior violations of Condition 60 have had an impact in lowering the bond ratings for the City and the City's other municipal enterprises.⁶ The services being provided by the City's financial consultants with respect to Burlington Telecom are intended to address this and other issues of general concern to the City and its taxpayers.

The Department contends the Board should grant the motion both with respect to past payments and, subject to certain oversight conditions and limitations (as discussed below), similar payments in the future. The Department believes that there is a legitimate argument that the City should be able to use the general fund on its own behalf "to protect itself from the consequences of its prior actions" with respect to Burlington Telecom.⁷ The Department agrees with the analysis the Chittenden Superior Court adopted in ruling on a contempt motion against the City for its use of the general fund for some of the same payments that are at issue here.⁸ That court concluded that the payments to the City's consultant for strategic assistance regarding potential acquisitions and negotiations with CitiCapital did not violate Condition 60 as "the City

6. Burlington Telecom's filing of 5/27/11 at 4.

7. Department's response of 8/31/11 at 1.

8. Ruling on Motion for Contempt, Chittenden Superior Court (8/19/11) Docket No. S1588-09 CnC; *see* Burlington Telecom's filing of 8/24/11.

cannot be barred from taking such steps for the benefit of all taxpayers merely because BT also benefits."⁹ The Department further believes that this analysis is "relevant as well to categories of expenditures that were not before the Superior Court: for consultants reporting to the Blue Ribbon Committee and for legal costs related to criminal investigations and insurance coverage issues."¹⁰ In support of its argument, the Department notes:

The costs incurred to date for these purposes were in support of the City, not payments made "on behalf of" BT. The payments also do not relate to BT's provision of service; indeed, D&F operational support regarding BT services has been charged appropriately to BT. Rather, the costs already expended and at issue in this Motion flow from the mismanagement of BT's finances by top officials of the City — people elected by the people of Burlington, and the direct subordinates and appointees of those elected officials. Even apart from the language of Condition 60, as a matter of regulatory policy it is appropriate that the City, i.e. its taxpayers, should pay these costs, just as shareholders of an investor-owned utility would pay for costs flowing from managerial imprudence, rather than the ratepayers of BT.¹¹

Accordingly, the Department urges the Board to conclude that the payments made to date do not violate Condition 60.

In its filing of August 30, 2011, Comcast opposes Burlington Telecom's motion. Comcast contends that the payments at issue benefit Burlington Telecom by increasing its viability and options. Comcast argues that the Board should not eviscerate the protections provided by Condition 60 and its previous Orders by allowing Burlington Telecom to access City funds based on a claim that an expense related to Burlington Telecom is for the benefit of City taxpayers rather than for Burlington Telecom itself. Comcast interprets the Board's Order of February 16, 2010, as prohibiting the payments to consultants at issue in the motion.¹²

9. *Id.* at 7.

10. Department's response of 8/31/11 at 2.

11. *Id.* "The Department also does not view these categories of costs as either business losses or costs associated with the investment in BT. If they were, payment of them by the City could arguably violate the City Charter, 24 V.S.A. App. § 3-438(c)(1)." *Id.*

12. Docket 7044, Order of 2/15/10; the Board declined to authorize Burlington Telecom to borrow \$386,673 from the City of Burlington's pooled cash system to meet a scheduled interest payment due to CitiCapital Municipal Finance on February 17, 2010.

In its reply filed on September 12, 2011, Burlington Telecom is agreeable to the oversight conditions recommended by the Department, which are discussed below. Burlington Telecom disputes Comcast's arguments against the motion. Burlington Telecom contends that the Board's Order of February 16, 2010, related to the capital lease obligations of Burlington Telecom and cannot be construed to prohibit the City's payments to consultants.

V. DISCUSSION

Condition 60 of the CPG restricts the City "from using general revenue streams to fund commercial cable and telecommunications activities or to repay lease obligations relating to those same activities."¹³ Among other requirements, Condition 60 requires Burlington Telecom to reimburse the City for "any expenses incurred or payments made by the City in support of services that BT provides to non-City entities."¹⁴ Condition 60 is related to provisions in the City's charter that seek to ensure that the losses and costs of any cable television or telecommunications services owned or operated by the City are not borne by city taxpayers.¹⁵

It seems clear from the filings that the principal purpose of the payments at issue is to minimize the losses of, and consequences for, the City and its taxpayers related to the past financial management of Burlington Telecom. As much as one may regret past actions that led to the current situation and the expenditure of additional funds on this matter, it would seem irresponsible for the City not to seek some expert assistance to minimize its losses, curtail and diminish other negative consequences, and salvage as much value as possible from the City's investment in Burlington Telecom. To preclude the City from incurring expenses to minimize losses to taxpayers would appear contrary to the interests of City taxpayers. These payments are similar to the expenditures any owner or significant investor in a troubled telecommunications company would make to protect itself and preserve as much of its investment as possible. The payments at issue certainly relate to Burlington Telecom and may in some sense benefit Burlington Telecom, but these payments are not being used to fund its operations, support its

13. Docket 7044, Order of 9/13/05 at 40; Order of 10/8/10 at 14.

14. Docket 7044, CPG of 9/13/05 at 14.

15. 24 V.S.A. App. § 3-438(c)(1). *See also* Condition 56 of CPG and the Board's Orders of 9/13/05 and 10/8/10.

services, or meet its obligations. As such, no violation of Condition 60 is evident with respect to these payments.

While the Department generally supports the City's motion, its filings also suggest regulatory concerns about the magnitude of future expenditures by the City and the length of time it may take to cure existing violations of the CPG. The Department notes that if the City's efforts and expenditures do not result in a cure proposal within a reasonable time, the Board may have no alternative but to revoke the CPG.¹⁶ Without advocating the imposition of any arbitrary deadline or dollar limit on the City's efforts to resolve matters, the Department emphasizes the importance of monitoring future expenditures and the City's progress toward curing its CPG violations.

Accordingly, the Department proposes that the Board (i) declare that the past payments at issue do not violate Condition 60, and (ii) rule, subject to certain conditions and limitations, that the City "may continue to pay such costs going forward without further approval."¹⁷ The Department recommends that the Board require the City to make monthly filings detailing any such expenditures made from the general fund by category. The Department refers to the categories of expenditures set forth in Burlington Telecom's filing of May 27 as providing a general model for such monthly filings with certain refinements, most notably a separate breakdown of expenses related to negotiations (a) with potential partners/investors and (b) with CitiCapital. The Department draws further distinctions with respect to CitiCapital negotiations between expenditures that should be charged to Burlington Telecom and others that may be properly charged to the general fund.¹⁸ The Department recommends that the City should also

16. The Department also notes that "[e]ven permissible expenditures from the City's General Fund should not continue indefinitely if they are not producing results." Department's filing of 8/31/11 at 3.

17. Department's response of 8/31/11 at 4.

18. "For example, time spent negotiating the details of a like-kind exchange or return of specific equipment would flow from BT's operation in a manner likely within the contemplation of Condition 60 as written. However, time spent negotiating over a potential claim that the City itself is liable for losses incurred by CitiCapital is only tenuously related to BT's services or operations. These costs are more likely to be related to the actions of the City Administration as such (i.e., top officials elected by Burlington voters or directly appointed by elected officials). The Department believes that the latter costs are not properly within Condition 60's scope, and should be paid from the City's General Fund, while costs associated with the use of equipment are sufficiently related to BT's operations and services to be paid by BT (in compliance with its CPG conditions). (If issues with CitiCapital proceed to litigation, (continued...))

report the receipt and disposition of any funds it receives related to exclusivity periods and cost reimbursements from potential investors and partners.

I believe the Department's concerns are well-founded. However, it is difficult in advance to anticipate how future consultant expenses related to negotiations should be allocated between Burlington Telecom and the City's general fund. It is also possible that the federal district litigation between Citibank, N.A. and the City or other events may raise additional expense allocation issues. Under these circumstances, I am reluctant to prejudge the appropriate charging of future expenditures related to Burlington Telecom. Accordingly, I do not recommend to the Board that it issue a ruling at this time, even with conditions, as to future expenditures from the general fund that do or do not need to be charged to Burlington Telecom.

This absence of a definitive ruling with respect to future payments may create some risk for Burlington Telecom, but there are ways to mitigate these risks. First, this decision with respect to past payments and the discussion herein should provide a reasonable basis for the City to determine whether a prospective payment may be problematic. Second, in the case of any such prospective payment (or allocation of a payment between Burlington Telecom and the City) that may be problematic (which should be broadly defined), the City would be well advised to consult with the Department in advance of making any such payment or allocation. I would encourage the City to work together with the Department (assuming the Department is willing to do so) to develop appropriate procedures for any such review.

There should also be a mechanism to keep the Board informed as to any payments or allocations of payments that are charged or not charged to Burlington Telecom. Rather than require separate monthly filings of such expenses, it would seem appropriate to include such expense accounting (similar to the chart that was attached to the May 27 filing of Burlington Telecom with the category refinements proposed by the Department in its August 31 response),¹⁹ as part of the status reports that Burlington Telecom is required to file with the Board every two

18. (...continued)
it would presumably be appropriate for these costs to be covered by insurance. Insurance coverage may be similarly dependent on the specific nature of the claims asserted.)" Department's response of 8/31/11 at 3–4.

19. Chart titled "City of Burlington Legal, Consulting & Regulatory Expenses related to Burlington Telecom" included with Burlington Telecom's filing of May 27, 2011.

months under the Board's Order of October 8, 2010. In the same reports, Burlington Telecom should also report the receipt and disposition of any funds it receives related to exclusivity periods and cost reimbursements from potential investors and partners.

VI. CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, I conclude that the past payments from the City of Burlington's general fund between July 1, 2009, and May 18, 2011, as described by Burlington Telecom in its filings of April 13 and May 27, 2011, do not violate Condition 60 of the CPG. I recommend that the Board issue a declaratory ruling to the effect that these past payments do not violate Condition 60 of the CPG, but that it not issue any ruling at this time with respect to future payments from the general fund relating to Burlington Telecom. I also recommend that the Board modify Condition 10 of its Order of October 8, 2010, in this docket to require that Burlington Telecom's status reports include information with respect to such expenses and the receipt and disposition of certain funds as detailed in the discussion above.

Given the nature of this declaratory ruling, I believe it is appropriate to present my report as a proposal for decision to the Board for its judgment pursuant to 30 V.S.A. § 8.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 8th day of November, 2011.

s/John P. Bentley

John P. Bentley, Esq.
Hearing Officer

VI. BOARD DISCUSSION

The Department and the City each advised the Board on November 4, 2011, of their support for the adoption of the proposal of the Hearing Officer. Neither the Department nor the City had any further comments on the proposal. On the same date, Comcast filed objections to the proposal.²⁰

Comcast contends that the proposed ruling misreads Condition 60 in concluding that it is inapplicable to the expenditures at issue. Comcast also argues that even if these expenditures were not barred by Condition 60, the Board should not permit them for other reasons. Comcast also proposes certain procedural requirements that it believes should be applied to Burlington Telecom costs and expenditures.

Comcast argues that Condition 60 does not distinguish between expenditures intended to minimize the losses and consequences to the City and its taxpayers stemming from the City's investment in Burlington Telecom, and those used to fund Burlington Telecom's operations, support its services, or meet its obligations. Comcast asserts that nothing in the text of the CPG or the related Order suggests any such distinction in the use of City funds related to Burlington Telecom.

Condition 60 applies to payments made by the City "on behalf of Phase III,"²¹ "in support of Phase III activities" and "in support of services that BT provides to non-City entities." As the Board stated in its Order of September 13, 2005, authorizing the issuance of the CPG, Condition 60 was included in the CPG to preclude the City "from using general revenue streams to fund

20. The counsel for two City taxpayers, who were plaintiffs in the related proceeding in Chittenden County Superior Court (Sup. Ct. Dkt. S1588-09 CnC) but are not parties to this proceeding, also filed comments in opposition to the Hearing Officer's proposal on November 4.

21. The scope of Phase III activities are described in the Board's Order related to the CPG:

Phase III of the BT telecommunications project refers to the new facilities that BT intends to construct in order to offer CATV services, as well as telecommunications and high-speed internet services. In Phase III, BT will construct a fiber-to-the-premise ("FTTP") open access network that will pass every residence, business, and institution located within the City by summer 2006. The system will have the capability to allow BT to offer telephone service, high-speed internet access service, cable television service, and transport services to other service providers on an open access basis.

Order (9/13/05) at 6. Phase III of the project has not been completed by Burlington Telecom.

commercial cable and telecommunications activities or to repay lease obligations relating to those same activities."²²

The Board has previously concluded that the City violated Condition 60 in financing the operations of Burlington Telecom in 2007 to 2009.²³ In contrast, the City expenditures at issue here do not directly support the commercial cable and telecommunications activities of, or services provided by, Burlington Telecom and are not being used to repay Burlington Telecom's lease obligations. As the Hearing Officer notes, the payments at issue are similar to the expenditures any owner or significant investor in a troubled telecommunications company would make to protect itself and preserve as much of its investment as possible. Certainly, if a telecommunications subsidiary of Comcast were in grave financial trouble, shareholders of Comcast would reasonably expect Comcast to take steps and incur some costs to minimize the losses from its investment and the related consequences.

At the same time, the Board acknowledges that there may be circumstances under which it is difficult to distinguish between expenditures aimed at mitigating taxpayer losses and those that support Burlington Telecom's operations. For this reason, the Board supports the Hearing Officer's recommendation (contrary to the original position of Burlington Telecom and the Department) that the Board's ruling in this Order should be limited in scope to certain payments made from the City's general fund between July 1, 2009, and May 18, 2011, as described by Burlington Telecom, and that the Board should not issue any ruling at this time as to future payments from the general fund.

Furthermore, the Board is concerned that the steps taken by the City to minimize taxpayer losses may, in the end, increase such losses. Although the Board is reluctant to challenge the judgment of City officials and other managers of regulated utilities when it comes to protecting the interests of their taxpayers or shareholders, the past financial and legal management of Burlington Telecom does not inspire a high level of confidence about such judgments. The status and other reports provided by the City and the Department are somewhat encouraging and suggest improvements in management and financial capabilities, but it is clear given this utility's

22. Order (9/13/05) at 40; *see also* Order of 10/8/10 at 14.

23. Order (10/8/10) at 10-11 and 33.

past history that regular and close monitoring by both the Department and the Board is appropriate under the circumstances.

Burlington Telecom is currently required to file status reports with the Board every two months. It would be helpful for the Board to have more frequent updates concerning the financial situation of Burlington Telecom, payments from and to the City's general fund, and the status of ongoing negotiations and legal proceedings. Accordingly, the Board will require Burlington Telecom on an ongoing basis to file monthly status reports with the Board within 15 days after the end of each calendar month (which shall include financial information for and as of the end of such calendar month).

Condition 60 was imposed in large part to protect the taxpayers of Burlington. It is troubling that this failure to adhere to the condition puts this Board in the position of trying to help taxpayers by allowing **more** tax dollars to be expended.

VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Service Board ("Board") of the State of Vermont that:

1. The conclusions and recommendations of the Hearing Officer are approved and adopted by the Board, except as modified below.
2. The payments made from the City of Burlington's general fund between July 1, 2009, and May 18, 2011, as described by Burlington Telecom in its filings of April 13 and May 27, 2011, did not violate Condition 60 of the Certificate of Public Good issued to Burlington Telecom on September 13, 2005.
3. The reports that Burlington Telecom is currently required to file with the Board every two months during the pendency of this proceeding, under Condition 10 of the Board's Order of October 8, 2011, shall in the future be filed on a monthly basis ("Monthly Reports") within 15 days after the end of each calendar month (which Monthly Reports shall include financial information for and as of the end of such calendar month), beginning on December 15, 2011.

4. The Monthly Reports shall include, in addition to other required items, a description and an accounting of:

- (a) any expenses related to Burlington Telecom that are made from the City's general fund and not charged to Burlington Telecom; and
- (b) the receipt and disposition of any funds the City receives related to exclusivity periods and cost reimbursements from potential investors and partners in Burlington Telecom.

5. This proceeding is remanded to the Hearing Officer following the entry of this Order.

Dated at Montpelier, Vermont, this 23rd day of November, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: November 23, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)